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Procedures and instruments

Working paper for the working group IX on Simplification

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Standardisation and typology of the legal instruments and procedures in a proposed Constitutional Treaty

The standardisation of legal instruments and procedures seems a necessary pre-condition for the overall transparency of decision making processes in the EU in both their legislative and implementing sense.

This should include the creation of clear typology of instruments available for taking the Union action.

The basic standardisation could include the following division:

1. Clear distinction between **binding and non-binding instruments**
2. Further division of binding instruments into **legislative and non-legislative**

The question to be treated is what is perceived as a legislative act. The legislative act should fulfil the following criteria:

- General applicability
- Direct effect
- The content – must treat the essence of domain under regulation even if further implementing measures to such an act are foreseen

Legislative instruments should have one or possibly two forms and one single procedure for their adoption.

(European) laws: This instrument (resembling current regulation) would be adopted by a standard legislative procedure, involving the European Parliament and the Council in its legislative formation on the proposal tabled by the Commission (the sole right of initiative still maintained). Thus the current co-decision (with possible further simplification in the procedure itself) should become a standard adoption for legislative acts. The current system where the Commission shares the power of initiative with the member states in the 2nd and 3rd pillars turned out not to be very effective as the states often use the right of initiative for pushing their own interests. Plus drafting of legislative proposals requires a considerable technical and administrative capacity.

As to the procedural requirements, the Parliament should rule on legislative acts by the majority of voting cast and the Council by qualified majority.

The legislative power of the Union (i.e. that of the EP and the Council) is given either on basis of an explicit mandate in the Treaty, or wherever there is a competence of the Union, either exclusive or shared (the compliance with the subsidiarity principle will be ensured by *ex ante* control - “early warning mechanism” or “legislative watchdog”, or *ex post* control by the ECJ). It could be expressly stated that Union does not have a power to legislate in the domains where it does not even have a shared competence.

European laws could be further implemented:

- a) **by empowering clause**, giving the legislator (EP and Council) right to empower another EU body, usually the Commission, to adopt implementing measures (European decrees or regulations, see further). This empowering clause will have to be included in the legislative text.
- b) **by member states**. In that case, European law would only act as a framework law and it will be stated that the implementing measures are vested in member states. This would be a case resembling the current directives implementation. The national implementation will be carried out according to national implementation systems.

Some question that arise here:

Could the European laws intended for further implementation have direct effect? We can presume they can, as the current directives do provided that they stipulate rights and duties formulated undoubtedly and precisely.

Is it possible to use the standard legislative procedure for all the domains of EU action (including CFSP)?

As the pillar structure will probably disappear, the differences will remain in the procedures. However, most of the actions taken under CFSP or ESDP do not fulfil the criteria of legislative acts (as stated otherwise) and therefore cannot have form of laws. They will be individual legal acts for which special procedures can be envisaged. However, it can still be expressly stated in the Constitutional Treaty that the Union does not have right to adopt any legislative acts in the area of CFSP. For the domain of police and judicial co-operation in criminal matters, some other mechanism could be foreseen as well. However, there is a tendency to shift the legislative tools more towards the classical Community method.

Non-legislative acts

The typology of these acts should also be simplified, however the procedures will remain differentiated depending on the domain regulated and the body adopting such an act.

It is possible to define non-legislative acts as:

- Binding acts
- Adopted either on basis of the Constitutional Treaty itself, or on basis of empowering clause in the legislative act by the legislator

It is further possible to divide the acts into:

- **Implementing acts – European regulations/European decrees**

These acts are of a general applicability but they can only be adopted on basis of the legislative act (European law) or directly on basis of treaty articles. The way of adopting them is given by internal procedures of institution entitled to adopt them (e.g. Commission, ECB)

- **Decisions**

Individual acts (not of general applicability). They can be adopted on basis of Treaty only and under the procedures described therein. (e.g. decision of the Commission on a fine under competition policy, decision on a common position under CFSP etc.)

- **Other individual acts not having a form of decision** (e.g. the acts of nomination of the members of EU bodies) – however, this category can still take form of a decision if deemed more transparent/simple

The procedures cannot be united at this stage and they will have to be stipulated differently for different situations given by the Constitutional Treaty and/or Protocols.

The budgetary procedure should be standardised as well to have a form of a legislative act (European law), even if it is not *de facto* a legislative procedure but an individual decision (which is case in many member states). This would require further alterations in the budgetary procedure (e.g. cancellation of mandatory and non-mandatory expenditure). Or it is possible to construct a budgetary procedure as a procedure *sui generis* (which is also the case in many countries). In that case it will have a form of a common decision of the EP and the Council.

Non-binding acts

It should be expressly stated that the EU institutions cannot adopt any other binding acts than those stated in the Constitutional Treaty and to which the Union is empowered.

All the other instruments/acts adopted by the EU bodies have a non-binding nature.

An exemplary list of such instruments can be given such as resolutions, guidelines, declarations, communications, opinions, recommendations etc.

This, however, should not exclude the possibility of the institutions adopting their internally binding acts, supposing that they do not infringe the other Union binding regulation, as well as broad principles on which the Union is founded.